IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2019] EWHC 3719 (QB)

No. QA-2019-000261

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 6th December 2019

Before:

MRS JUSTICE TIPPLES

B E T W E E N :

BURKE — Claimant

- and -

IMPERIAL COLLEGE HEALTHCARE NHS TRUST — Defendant

MR SANDERSON appeared on behalf of the Claimant

MR BARNES appeared on behalf of Defendant.

J U D G M E N T

MRS JUSTICE TIPPLES:

1 In this action the claimant, Mr Burke, pursues the defendant, an NHS Trust, for damages in respect of allegations of negligence in connection with a partial nephrectomy which was carried out in hospital on 10th February 2015.

2 The letter before claim was dated 24th June 2016 and proceedings were commenced on 19th January 2018. The defence was served on 28th November 2018, and the first case management conference took place before the assigned Master, Master Eastman, on 14th January 2019. No directions were given for expert evidence at that stage as a mediation was anticipated, which ultimately took place on 24th June 2019. The mediation failed and there was a further case management conference, which also dealt with costs, on 30th July 2019. That case management conference dealt with all future case management directions to trial.

3 At the very end of that case management conference the Master gave the defendant permission to adduce expert urology evidence from a Mr Mark Sullivan, rather than a Mr Christian Brown, who had been mentioned in the defendant's directions questionnaire. The Master, as a result of the change of defendant's urology expert, did not impose any condition that Mr Brown's report (or any draft report) be disclosed as, based on what he was told by the defendant's counsel, he was satisfied that there was no "expert shopping".

4 The claimant, with the permission of Mr Justice Stewart, appeals that decision. The claimant does on the following grounds. First, the decision of the Master to permit the defendant to allow the expert urological evidence of Mr Mark Sullivan in place of that of Mr Christian Brown was unjust because it was made in response to an oral without notice application, unsupported by evidence, and without hearing full legal argument. Second, the Master was wrong to refuse to require the defendant to disclose all written expert evidence obtained from Mr Christian Brown as a condition of being granted permission to rely upon the expert urological evidence of Mr Mark Sullivan.

5 In giving permission to appeal Mr Justice Stewart also gave some directions for evidence and, in particular, made this direction on 23 October 2019:

> "The appellant has permission to rely in the appeal on the witness statement of Gary Smith [the claimant's solicitor] dated 16th September 2019. The respondent has permission to rely on witness evidence in response. Any such evidence to be filed and served within 21 days of service of this order. Either party may within seven days of service of this order apply to vary or set aside this paragraph of the order."

No application was made to set aside that paragraph of Mr Justice Stewart's order.

6 Therefore, in relation to this appeal, the claimant relies on the evidence of Mr Smith, which was dated 16th September 2019. The defendant has served evidence in response which is contained in the witness statement of Kate Cornelius dated 15th November 2019. That evidence from Ms Cornelius contains more detail in relation to the involvement of Mr Brown in this case, which will appear from the chronology set out below.

7 There is no transcript of the hearing before the Master on 30th July 2019, but the claimant's solicitors prepared a note of the hearing, which was approved by the Master in October 2019, and it is that attendance note of the hearing which has been placed before me for the

purposes of this appeal. I should also say that the defendant has served a respondent's notice which says this:

> "I, the respondent, wishes the Appeal Court to uphold the order on different or additional grounds because: (a) There is no transcript of the hearing and, on the basis of the notes of the hearing, the Master expressed the reason for making the order was limited to the conclusion that the respondent was not expert shopping by relying on the evidence of Mr Sullivan instead of that of Mr Brown. (b) However, it can reasonably be inferred that: (i) the Master did not consider it necessary to adjourn the issue in the absence of an application from the appellant, and (ii) the Master did not consider that it would be proportionate to order disclosure of the expert report of Mr Brown. (c) For the avoidance of doubt it is the position of the respondent, for the purposes of the appeal, that the order of the Master should be upheld, not only for the reason identified in paragraph (a) but also for the two reasons identified in paragraph (b) ..."

8 I should say at the outset that it is common ground that, on appeal against a case management decision, the appeal court cannot interfere unless the decision is plainly wrong, in the sense of being outside the generous ambit where reasonable decision makers may disagree, and Mr Barnes, the defendant's counsel (who was not counsel at the hearing before the Master but has been instructed in this matter on behalf of the defendant since about June 2019), has identified the relevant case law relating to the court's jurisdiction on appeal in his skeleton argument. In particular, he referred to the case of *Prince Abdul Aziz* in the Supreme Court [2014] UK SC64 at paragraph 13, where Lord Neuberger (on behalf of the majority of the Supreme Court) explained that:

> "I consider that the view taken by Vos J and the Court of Appeal, namely that a direction requiring personal signing of disclosure statements reflected the normal practice, was correct. However, that is not, in my view, the essential question when it comes to challenging paras 14 and 15 of the Order. The essential question is whether it was a direction which Vos J could properly have given. Given that it was a case management decision, it would be inappropriate for an appellate court to reverse or otherwise interfere with it, unless it was "*plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree*"."

9 However, I should add that the defendant accepts, if the correct information was not placed before the Master, such that he was misled, then that puts a rather different complexion on the matter, and the defendant cannot resist the appeal in those circumstances.

10 Before I turn to the chronology and relevant facts in more detail, I should just say something about the relevant legal principles which apply when one party wishes to change expert. There is a very helpful analysis of the principles, and whether any conditions should apply, in a recent case called *Coyne v Morgan* (Case No. B50BN015), a decision of Mr Justice David Grant. At paragraph 31 of that decision David Grant J sets out a number of points drawn from the relevant authorities, and there is no dispute between the parties that that represents the correct approach to the law.

11 In this case the claimant does not dispute that the defendant should be entitled to instruct a second expert, Mr Mark Sullivan, in place of the expert originally instructed, Mr Christian Brown. The only dispute is the terms upon which the defendant should be permitted to do so.

12 In a case called *Edwards-Tubb v JD Weatherspoon PLC* [2011] EWCA Civ 136, Lord Justice Hughes held (and Richards LJ and Lord Neuberger MR agreed with him) at paragraph 31:

> "For these reasons I would hold that the power to impose a condition of disclosure of an earlier expert report is available where the change of expert occurs pre-issue as it is when it occurs post-issue. It is of course a matter of discretion, but I would hold that it is a power which should usually be exercised where the change comes after the parties have embarked upon the protocol and thus engaged with each other in the process of the claim."

I should also add that the case of *Edwards-Tubb* includes a lot of valuable guidance and information about this particular jurisdiction and the reasoning behind it. However, I do not need to read that out or go into any detail for the purposes of this decision.

13 In the more recent case of *Vilca v Xstrata Ltd* [2017] EWHC 1582 (QB) Mr Justice Stuart-Smith, having reviewed all the relevant authorities, said this at paragraphs 26 and 32:

> "The second question, which arises if the court has determined that it has case-management powers, is how they should be exercised on the facts of the particular case. I have already said that they should always be exercised in accordance with the overriding objective. The cases to which I have referred above do not establish some different principle. What they establish is that the court will always have regard to the possibility of undesirable expert shopping and the instinctive desire for the court to have full information (with the associated desire for the other party to be assured that the court's process is not being abused). The Court of Appeal has consistently said (albeit in slightly differing terms) that the object of imposing a condition that reports of previous experts should be disclosed is to prevent expert shopping and to ensure that full information is available."

And then at the end of paragraph 32 the judge said:

> "The principles are now well-established: anyone competent to conduct litigation knows that, if there is a hint of undesirable expert shopping or that significant relevant material is being withheld, the imposition of the condition will be the usual order."

14 Therefore, it seems to me the issue in this case is whether the court should depart from the usual rule as set out by the Court of Appeal in *Edwards-Tubb* and, in allowing the defendant to change expert, refuse to impose any condition requiring disclosure of an earlier expert report or draft report.

15 Further, it is clear that the court's discretion whether to impose a term when giving permission to a party to adduce expert opinion evidence arises irrespective of the occurrence of any "expert shopping". It is a power to be exercised reasonably on a case by case basis and, in each case, having regard to all the particular circumstances of that case (see paragraph 31(4) of the decision of *Coyne v Morgan*). The importance of this is that, when the court in its discretion has to consider whether to impose a term or condition giving a party permission to adduce expert evidence, the court needs to understand why the usual rule is not to apply and what the factual basis for that is. This is because, without an explanation making it clear there is no issue relating to "expert shopping", it seems to me there will always be, at the very least, a hint of expert shopping and that is enough, upon a

change of expert, to give rise to the impose of the condition requiring disclosure of the previous expert's report or draft report. Ordinarily, therefore, one would expect the starting point to be a letter from the party seeking to change from expert A to expert B to the other side setting out what they want to do and why and, if the proposal cannot be agreed, then it will have to be determined at the appropriate hearing before the Master, whether at a case management conference or by way of separate application, depending on the facts of the particular case and the stage at which the proceedings had reached. However, one can see that, if the party seeking to change from expert A to expert B is not prepared to do so on the usual condition (ie with disclosure of expert A's report or draft report) then, without a very cogent explanation for this, such a position is likely to be contentious. It will be contentious because it will give rise to concerns or suspicions that the party seeking to change expert has something to hide and that there is the hint or the possibility of "expert shopping".

16 In any event, given the significance of expert evidence in a clinical negligence dispute, it seems to me that as a matter of good practice, and the defendant accepts this, any application to change the identity of an expert from expert A to expert B should be notified to the other party in advance of the hearing so that that party has a proper opportunity to consider the proposed application and respond appropriately. The flip side of this is that if a party fails to do so, and seeks to raise an important issue such as this without notice for the first time at a case management conference, then that party is under a duty of full and frank disclosure of all matters relevant to the application, and that includes all matters of fact and law which are or may be adverse to the applicant (see, for example, the Civil Procedure Rules at para.25.3.5 in relation to interim remedies). In the present context, it seems to me that that would extend to all matters necessary to show to the court that there is no possibility or hint of expert shopping and that by changing expert significant relevant material is not being withheld. Those seem to me to be matters which are material and which any court hearing an application on a without notice basis should be informed of. There is no dispute that these basic principles, which I have just referred to in the context of without notice applications, are applicable if an application to change expert is made without notice.

17 I now need to say rather more about the relevant facts in the chronology of these proceedings, and I take this principally from the opening note which was prepared for the court by Mr Sanderson, counsel for the claimant, much of which was not disputed by Mr Barnes, counsel for the defendant.

18 The claimant, Mr Burke, underwent an open partial nephrectomy, as I have said, in February 2015. His case is that during the operation his bowel was perforated by the operating surgeon. He says this injury was unrecognised at the time and for a week following the operation. He says that over that week he was acutely ill and in great pain with worsening abdominal distention. On 17th February 2015 he underwent an emergency laparotomy to remove the damaged section of the bowel and to carry out a defunctioning ileostomy, forming a stoma in the abdomen to collect faecal matter in a bag. He then wore a one-piece stoma system for three and a half months before the ileostomy was reversed. He says he suffered a complex incisional hernia that required further surgery to fit a mesh, and he says he has continuing intrusive symptoms that have prevented his return to work and greatly reduced his quality of life.

19 In terms of the way his case is presented, he has made three central allegations. First, the surgery was poorly performed leading to the bowel perforation. That allegation is denied. The defendant says he was advised of the risk of surgery and the perforation was a risk. Second, Mr Burke says post-operative care was poor, which led to a delayed discovery of

the perforation and unnecessary pain and suffering. The defendant admits that the post-operative care was poor. Third, Mr Burke says he was not properly consented for the partial nephrectomy, in that he was told that an open operation was the only surgical option and the alternative of minimal access surgery, i.e. laparoscopic or robotic surgery, was not discussed. In relation to that allegation, the defendant admits the option of robotic or laparoscopic surgery was not offered, but in response the defendant asserts it "*was only required to inform the claimant of reasonable treatment options that would have been available to him. As the only member of staff capable of performing the robotic or laparoscopic surgery was not willing to perform the same due to the location of the tumour, this was not a viable treatment option*". The reference there to the only member of staff is a reference to a Professor Vale, and it is said that he could not perform the operation. There is no dispute that in order to determine the issues in this case expert evidence is required from a urologist and the claimant has instructed a Professor Sriprasad.

20 Turning to the chronology of the allegations and engagement with the protocol, it starts in 2016. By letter dated 24th June 2016 the claimant sent a letter of claim which raised allegations of poor surgery which led to the perforation of the bowel and post-operative delay. The allegation about lack of consent was not raised at that stage. Four months later, on 19th October 2016, the defendant responded in a detailed four-page letter. Paragraph 2 of that says:

> "Please note this response has been prepared with the benefit of independent expert evidence from a consultant urologist and robotic/laparoscopic surgeon."

The name of the independent expert is not identified in that letter, but we now know, from the evidence which has been served by the defendant in response to this appeal, that that expert was Mr Christian Brown.

21 On 28th November 2017, so a year later, the claimant sent a second, or revised, letter before claim. This letter identifies for the first time the allegations concerning consent, and it raises the additional allegation that the claimant was incorrectly advised that the tumour could only be removed by open surgery when minimal access surgery was an appropriate option. That allegation is set out at page 3 of the letter. The defendant responded to that allegation five months later in a letter dated 18th April 2018. The defendant's solicitors dispute that allegation, and in doing so their letter opens by stating:

> "We refer to your letter dated 28th November 2017 as set out in our response below. We confirm that we have obtained independent expert evidence in order to be in a position to respond."

So, the response has been prepared with the benefit of an independent expert. We now know, from the evidence served by the defendant on this appeal, that that expert was Mr Brown.

22 The claim form was issued on 19th June 2018 and the particulars of claim were served on behalf of the claimant on 20th July 2018. The particulars of claim set out the three central allegations I have described. The defence was served four months later on 29th November 2018. The covering letter from the defendant's solicitors says this:

> "We confirm that our client's defence is based on supported witness and expert evidence and has been settled by counsel and this is the pleading on which we intend to make our representations at trial."

So, an independent expert has provided input in relation to the defence and, again, in the light of the evidence served by the defendant's solicitors on this appeal, that expert was Mr Brown. So, he was involved in providing information for the service of the defence.

23 The next procedural step to happen was on 14th December 2018 when the defendant completed and served the directions questionnaire. The directions questionnaire was signed by the defendant's solicitors and, in the box relating to experts. it explains that the defendant wished to use expert evidence at the trial or final hearing. In answer to the question in Section D of the form: "*Have you already copied any experts report(s) to the other part(ies)?*" the box saying: "*None yet obtained*" is not ticked, but what is ticked is "*No*" in answer to that question, so no expert evidence had been sent to the claimant. Then looking at the identity of the experts in Section E of the form, the expert who is identified is Mr Christian Brown, whose field of expertise is said to be urology. The justification for instructing him is "*breach of duty and causation*", and no estimate of costs was provided. The form also suggested that an expert in colorectal surgery was necessary to deal with the condition and prognosis, but an expert was not named. So, on this form, it is Mr Brown who is going to be instructed on behalf of the defendant to deal with the expert issues at the heart of the case.

24 On 21st December 2018 the defendant's cost budget was prepared and served, and that included costs in respect of a report from the expert on urology. It is not clear to me from the papers where the figures have come from, but the claimant's counsel says it identifies costs of £2,406.25 on the expert's report. No issue was taken about that at the hearing. However, it is fair to say that on the document I have at page 87 of the bundle, I cannot identify that figure myself. I do not think there is any issue that costs have been spent on an expert, and that is not surprising given the chronology I have noted to date.

25 The next thing to happen was on 14th January 2019 there was a CCMC. At that stage, as I mentioned briefly when I started this judgment, directions were limited to disclosure and witness statements to allow for the mediation. No direction was given in relation to expert evidence. There is a copy of Master Eastman's order dated 14th January 2019 in the case management bundle, which was before the Master in July 2019. What I notice from that order – it is the very end of it at para.7 – is that there is express provision for a further CCMC in the event that the mediation failed. Paragraph 7 provides that the CCMC would be held on Tuesday 30th July 2019 at 2.00 p.m. with a time estimate of 20 minutes. So, all parties were aware in January 2019 of the date of the next CCMC in the event the mediation failed.

26 The defendant served a Part 18 response on 21st May 2019. The next thing to happen before the mediation took place in June 2019 is set out at paragraph 16 of Ms Cornelius' witness statement. She says that the defendant obtained further input by way of a letter from Mr Brown and then held a conference with counsel on 21st June 2019 which Mr Brown attended by telephone. At the conference counsel enquired as to Mr Brown's experience undertaking a robotic partial nephrectomy, and Mr Brown confirmed that he had very limited experience of robotic partial nephrectomy as a consultant. The mediation, as I have said, took place on 24th June 2019 and failed. On 19th July 2019 the claimant served draft amended particulars of claim. That was an issue dealt with at the CCMC, and the amendments were, as I understand, dealt with by consent. There is no particular issue about that.

27 In any event, after mediation and before the CCMC, on 24th July 2019 the claimant's solicitors sent through draft directions to the defendant's solicitors. Mr Smith sent an e-mail which said this:

> "Dear Kate [Ms Cornelius], Herewith the claimant's draft directions which reflect our earlier discussion today. Given it's my last day in the office tomorrow I would be grateful to receive your client's response on the application for directions. If the directions are not approved I would be grateful to receive your proposed directions."

So, Mr Smith is plainly setting out what he sees as the way forward on behalf of his client, in terms of directions, and seeking to engage with the defendant's solicitors in order to have some idea as to what areas (if any) were going to be in dispute before the CCMC.

28 The response sent first thing the next morning by Ms Cornelius, on 25th July, was this:

> "Dear Gary [Mr Smith], Thank you for your e-mail. I'm unlikely to be in a position to obtain instructions in such a short timeframe. In any event, I do not anticipate it will be possible to agree directions as per your attached draft. I will come back to you with the defendant's draft directions once I have received instructions and I am in a position to do so."

Mr Smith responded ten minutes later by e-mail saying:

> "Dear Kate, Thank you for your e-mail. I'm slightly surprised that you are not even able to highlight areas of dispute. The defendant ought to have been considering appropriate directions just the same as the claimant. I attach an updated set of directions. The claimant shall also be seeking leave to rely upon an expert histopathologist."

29 As far as I can tell on the documents before me, the defendant did not serve any revised directions tailored to a CCMC before Master Eastman on 30th July 2019 in advance of that hearing. Further, I have not been taken to any document showing that the defendant served any substantive response to the claimant's draft directions in advance of the hearing on 30th July.

30 On 30th July 2019, the date of the CCMC before the Master, there a number of points I should mention in order to set out the factual position in relation to that hearing.

31 First, as I have just mentioned, the defendant had not served any substantive response to the claimant's draft directions identifying any issues between them. The claimant did not know what the defendant's position on the directions would be.

32 Second, the defendant had not informed the claimant that it no longer wished to instruct Mr Christian Brown as a urology expert at trial.

33 Third, the defendant had not informed the claimant that it intended to instruct a different expert, namely, a Mr Mark Sullivan, or the reasons for that change. Further, it is not clear when the defendant made that decision but, in any event, it must have been before the start of the hearing on 30th July 2019 otherwise the defendant's counsel would not have had any instructions to make the application that he did.

34 Fourth, the defendant had not informed the claimant, and the claimant did not know, that it was Mr Brown who had provided the independent expert advice as a urologist and robotic/laparoscopic surgeon at the following stages of the proceedings: (i) at the time of the provision of the letter of response in October 2016, (ii) at the time of the service of the second letter of response of April 2018, (iii) at the time of the service of the defence in October 2018, (iv) at the time of a conference in October 2018, and (v) at the time of the mediation in June 2019. So, Mr Brown had in fact been involved at all key stages of the proceedings, from the defendant's perspective, for over two years, from October 2016. However, the claimant did not know that it was Mr Brown who was the expert at all stages because the correspondence, which refers to input from an expert, does not identify Mr Brown by name. That information has only been provided in the witness statement served by Ms Cornelius dated 15th November 2019. Further, from that chronology it is also clear that Mr Brown has been involved in advising on the three key allegations made by the claimant in these proceedings.

35 So, although the claimant was aware that he had not got a response from the defendant to the draft directions, he did not know about the second, third and fourth points that I have just identified. The claimant was not aware of any of these matters when the court proceeded with the CCMC on 30th July 2019.

36 The note of the hearing on 30th July 2019, prepared by the claimant's solicitors, runs to five pages and, as I have mentioned, has been approved by Master Eastman. The claimant was represented at that hearing by Mr Sanderson. The defendant was represented by a different counsel than appeared before me on this appeal. It appears that was because Mr Barnes was not available for that hearing. The attendance note records that the defendant's solicitor was also present at the hearing.

37 The note of the hearing starts off stating: "Going through proposed directions. Working through the claimant's version". Mr Sanderson then opened the CCMC and took the Master through various matters to update him. Then on page 2 it shows that there was a discussion about experts, there is mention of histopathology and also psychiatric evidence. The Master said that the claimant could obtain a histopathology report and refused an application for psychiatric evidence. There was no mention at that stage of the hearing that there was any issue with Mr Brown as the defendant's urology expert. The hearing then continued and moved on to issues such as the length of the trial and timetabling of evidence. Then a trial window was identified, length of trial was identified, and the note then records: "Remainder of directions approved".

38 At that point the defendant's counsel raises "one more thing" and it is important that I set out what the note actually records here. Under the heading "Defendant Expert" it says this:

> "**Def** [Defendant's Counsel] - Master, one more thing, the defendant will not be using a report from Mr Brown. We have spoken to him and he is not sufficiently experienced to prepare a Part 35 liability report as he has only done this type of surgery once before. His involvement to date has been to assist in responding to the letter of claim, and he has not prepared a Part 35 compliant report. His involvement to date adds nothing to the case. The defendant seeks to instruct Mr Sullivan in place of Mr Brown".
> "**DS** [which is a reference to Mr Sanderson] - Master, the claimant objects in the strongest terms. This is late notice and the defendant has not mentioned this before now. The defendant names Mr Brown in its directions questionnaire, and names him in its costs budget. Expert shopping…"

> "**Def** [Defendant's Counsel] – Master, there is no issue of expert shopping. This matter is simply beyond his expertise and he cannot assist the court. His current report is not Part 35 compliant".
> "**Master** - I can see this is not expert shopping. You do not have to serve the report of Mr Brown. The defendant can instruct Mr Sullivan".

39 Pausing there, that last sentence records the Master's decision in the light of what he was told in submissions by the defendant's counsel. Then the remainder of the hearing went on to consider costs budgets (which makes up the rest of the attendance note), and that was the final part of the hearing.

40 In relation to that attendance note, it is, of course, the claimant's note of what happened at the hearing, and it has since been approved by the Master. There is no note from the defendant's solicitors and there is no transcript, as I have said. It, of course, might be said that this note is incomplete. However, it is the best available, and it seems to me that, as the defendant chose to make its application without notice, or provide any advance warning of what the grounds or reasons were, then there is no real reason for me to adopt any latitude in what is recorded in the claimant's solicitor's note. That is all that I have to work with, and it has not been suggested to me that any aspect of this note is wrong.

41 So, what did the defendant's counsel tell the Master? It seems to me the Master was told three key things by the defendant's counsel.

42 First, the defendant's counsel told the Master that Mr Brown was not sufficiently experienced to prepare a Part 35 liability report as he had only done this type of surgery once before - it is not clear to me which "type of surgery" is referred to - but it would appear that this is a reference to robotic/laparoscopic surgery. So, what the defendant's counsel was saying to the Master was that Mr Brown did not have the right experience to give any useful expert evidence to the court.

43 Second, the defendant's counsel told the Master that Mr Brown's involvement was very limited and that involvement was only at a very early stage of the proceedings. It was said that "*his involvement to date has been to assist in responding to the letter of claim*" which was in October 2016, so almost three years before the CCMC, and that he had not prepared a Part 35 compliant report. So, what the Master was being told by the defendant's counsel was that Mr Brown had not been involved in the case since October 2016.

44 Third, what the Master was told, based on the two points I have just made, that Mr Brown's involvement adds nothing to the case.

45 Mr Sanderson objected at the hearing before the Master on the grounds of expert shopping, and Mr Sanderson mentioned to the Master, correctly, that Mr Brown had been mentioned in the directions questionnaire and the costs budget, but the Master was not taken to those particular documents. Indeed, I do not think those documents were actually included in the bundle before the Master. This is perhaps not surprising given that, when the bundle was prepared, nobody thought there was any issue with the identity of Mr Brown as the defendant's expert. In any event, based on the representations made by the defendant's counsel, and which the Master was entitled to rely on, and which continued with the submission: "*Master, there is no issue of expert shopping, this matter is simply beyond his expertise and he cannot assist the court. His current report is not Part 35 compliant*", the Master then concluded: "*I can see this is not expert shopping. You do not have to serve the report of Mr Brown*".

46 However, the problem with the Master's conclusion, and it seems to me the Master cannot be criticised for reaching it, is that the defendant failed, first of all, to disclose the full extent of Mr Brown's involvement in the case from October 2016 until June 2019, which I have explained above. Secondly, the defendant failed to disclose the full details of Mr Brown's expertise and the issues to which that expertise went, and I will say something more about that in a moment. Thirdly, the defendant's counsel failed to take the Master to any of the relevant law on this topic in relation to changing experts and, whilst I appreciate the Master may well be familiar with the relevant case law, it was certainly incumbent on the defendant's counsel to remind the Master of the relevant principles and, in particular, the low threshold that is required in order to impose the usual condition requiring disclosure of an expert's report (or draft report) on changing from expert A to expert B. As I have explained, if the court considers there is any hint of expert shopping that in itself is sufficient to impose the condition, and it seems to me that the defendant's counsel was obliged to remind the Master of those principles and how they should apply in the present context, and he did not do so.

47 Dealing with Mr Brown's expertise, there are, as I have already explained, three key issues in this case. There is no issue that Mr Brown is appropriately qualified to deal with the allegations relating to poor surgery and post-operative care, and Mr Barnes did not suggest otherwise in his submissions to me. There is an issue in relation to consent, namely, whether Mr Brown is appropriately qualified to deal with the issue of consent, and whether Mr Burke should have been offered a less invasive surgery in January or February 2015.

48 In relation to Mr Brown's expertise in relation to robotic/laparoscopic surgery, I now have the following information. First of all, on the day before the appeal hearing the defendant's solicitors sent to the claimant's solicitors a letter from Mr Brown dated 4th December 2019, which is written on Mr Brown's headed notepaper. He signs himself as "*Mr Christian Brown BSc MBBS MDFRCS, Consultant Urologist and Robotic/Laparoscopic Surgeon*" and it says this:

> "To whom it may concern. I have been asked to comment on my experience of robotic surgery (and/or laparoscopic surgery) in relation to partial nephrectomy. My current role is with high volume robotic radical prostatectomy. I have over 800 case experience of robotic prostate procedures. From 2009 to 2014 I performed routinely laparoscopic radical and partial nephrectomy, in total over 250 cases. I have not had formal training in or performed robotic partial nephrectomy, but I have been involved in many MDTs [which means multi-disciplinary teams] where these patients have been discussed, and I have worked in institutions and cancer networks where these services are offered routinely. I hope this is of assistance."

The letter is signed by Mr Brown, and attached to that is a declaration and a statement of truth, which refers to CPR Part 35.

49 So, in that letter what Mr Brown is saying, amongst other things, is that in the five-year period before February 2015, which is the date of the operation in this case, he performed routinely laparoscopic radical and partial nephrectomy in over 250 cases. So from that, it seems to me that he does have experience in minimal access surgery.

50 Secondly, I have also been provided with a document obtained by the claimant from the website of the Guy's & St Thomas' NHS Foundation Trust which relates to Mr Brown's

experience. It contains his biography and describes him as a consultant urological surgeon. It says this:

> "Christian Brown works as part of the robotic and laparoscopic team at King's and Guy's Hospital; renowned international centres of excellence in minimally invasive surgery (also known as key hole surgery). As well as elective and emergency core urological care, he provides a tertiary referral service for elective robotic and laparoscopic surgery including radical prostatectomy. Christian has performed over 900 minimally invasive laparoscopic/robotic procedures in the last five years and had trained other consultants both locally and nationally."

It then explains that Mr Brown has been a lecturer. In addition to that, of course, there is the defendant's solicitors' letter of response dated October 2016 where they identify that the expert who has had input in their response is a consultant urologist and robotic laparoscopic surgeon, who we now know is Mr Brown.

51 The claimant has also drawn my attention to information relating to a Mr Challacombe, who is Mr Brown's urological colleague at Guy's Hospital, whose profile says he is the highest volume surgeon for robotic partial nephrectomy in the UK. And what is said by the claimant is:

> "As a urologist at Guy's Mr Brown will attend weekly MDT meetings and so have direct knowledge of which kidney tumours are selected for robotic surgery and which for open surgery. He will have attended hundreds of MDT meetings with all his urological and radiological colleagues".

The claimant says that experience (from the hospital to which the claimant could have been referred) would be of very particular assistance to the court.

52 So, the point which the claimant makes when Mr Brown in his letter dated 14th December says: "*But I've been involved in many MDTs whose patients have been discussed or worked in institutions and cancer networks where the service is offered routinely*" is that those MDTs will have included meetings with Mr Challacombe, who is the highest volume surgeon for robotic partial nephrectomy in the UK.

53 The Master was not provided with any of this information about Mr Brown's experience and, coupled with Mr Brown's involvement in the case over a period of two and a half years, it seems to me it is quite clear that highly material information was not brought to the Master's attention by the defendant's legal representatives in order for the Master to decide whether or not this was a case of expert shopping or whether significant relevant information was being withheld from the court. Further, the situation was compounded by the fact this was information that the claimant did not have access to. This was because, although Mr Brown was mentioned in the directions questionnaire, the claimant simply did not know that it was Mr Brown who had been involved in the key stages of the litigation from the defendant's perspective, as Mr Brown had not been named in any of the defendant's correspondence.

54 Mr Barnes, counsel for the defendant at the hearing before me, says that the appeal should be dismissed because the Master made a case management decision and, as a matter of discretion, his decision was unimpeachable. That argument might work if all the material information had been placed before the Master on 30th July 2019 and that had been the basis of the Master's decision. However, as I have explained in some detail above, that was not

the case. The Master was not informed of Mr Brown's extensive involvement, his experience, or reminded of the relevant legal principles.

55 Second, Mr Barnes says, in essence, that it was the claimant's fault that we are now faced with the situation of an appeal, because what the claimant should have done at the CCMC was sought an adjournment. I disagree. It was incumbent on the defendant to make proper disclosure of its desire to instruct Mr Sullivan and the reasons for that, and to ensure that the proper information was put before the Master at the hearing. They failed to do so and the Master relied on what he was told by counsel, as he was entitled to do, and the Master was misled into making an order which was wrong in the circumstances. I am quite satisfied that the Master would not have done so if he had been provided with full information. This is because on the information which is now before me, I am quite satisfied that there is more than a hint of expert shopping in relation to the defendant's decision to instruct Mr Sullivan rather than Mr Brown. This is a case where the usual conditions requiring disclosure of the first expert's report or draft report should apply.

56 Third, Mr Barnes accepted that, if the Master was misled (which, if that happened, he submitted was inadvertent), then it is difficult for the defendant to maintain any opposition to this appeal.

57 I am quite satisfied that the Master did not have all the factual and legal information before him on 30th July 2019 to decide whether to allow the defendant to instruct Mr Sullivan as their urology expert in place of Mr Brown, and to decide whether or not it was appropriate to make the usual order in relation to the disclosure of Mr Brown's report and draft report.

58 The defendant by choosing to raise this as an issue for the very first time towards the very end of the CCMC came under a very clear obligation to make full disclosure of all material information relating to the application concerning the change of expert, which it failed to do. The information which was provided by the defendant's counsel to the Master was incomplete and wrong and, as a consequence, misleading.

59 As I have just said, it is quite clear to me that there is a more than a hint of expert shopping in relation to the evidence which is now available. This is a case in which it is clear to me the usual condition should be applied. That, in itself, is sufficient for me to dispose of this appeal.

60 I have decided this appeal should be allowed and I will make the order sought by the claimant.

C E R T I F I C A T E

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****This transcript has been approved by the Judge (subject to Judge's approval)****